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No. 765

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IN THE

SUPREME COURT OF THE UNITED STATES

LESLIE E. JETT,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of The Supreme Court of the United States:

The petitioner, Leslie E. Jett, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in Cause No. 16,105 of that Court on October 26, 1965.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been generally reported, but a copy thereof is appended to this petition.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Tennessee, Nashville Division, entered judgments of conviction on July 14, 1964, against the petitioner on charges of willful evasion of payment of income taxes for the years 1960 and 1961, and of willfully filing a false income tax return for the year 1961. The United States Court of Appeals for the Sixth Circuit affirmed these judgments of conviction on October 26, 1965.

Jurisdiction to entertain this petition is conferred on the Supreme Court of the United States by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Are donations made to candidates for political office *per se* taxable to the extent they are applied to the personal expenses of the candidate?

2. If so, was the taxability of such "diverted" funds sufficiently clear prior to the decision in *James v. United States*, 366 U.S. 213 (1961), to permit a finding that a taxpayer who failed to report such funds in his 1960 tax return acted with willful intent to evade the payment of taxes?

3. In a tax evasion prosecution, can a finding of willfulness be sustained if the only evidence offered to show willfulness consists of an uncorroborated exculpatory statement of the accused, allegedly made to a Revenue agent several months after the alleged offenses occurred, if such statement is used inferentially, as circumstantial evidence of guilty knowledge and intent?

4. In a tax evasion prosecution, can the Government prove the defendant's knowledge of the taxability of unreported receipts by introducing in evidence extra-judicial statements allegedly made by the defendant four to sixteen months after his tax returns were filed, such statements being offered as circumstantial evidence that the defendant knew at the time he made the statements, and hence, at the time he filed his returns, that the receipts he failed to report were taxable?

5. When a defendant in a tax evasion prosecution relies upon the defense of advice of counsel to negative willfulness, must he prove that he revealed all legally relevant facts to his counsel, or only that he revealed those facts which he in good faith believed to be relevant?

STATUTES INVOLVED

26 U.S.C. §7201. Attempt to evade or defeat tax.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. §7206 (1). Fraud and false statements.

> Any person who—
>
> (1) Declaration under penalties of perjury.—Willfully makes and subscribes

> any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> . . . .
>
> Shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

The petitioner (hereinafter called "defendant") was the Sheriff of Davidson County, Tennessee, during the tax years in question. He was charged in a five count indictment with willfully attempting to evade payment of income taxes for the years 1960 and 1961 (26 U.S.C. 7201), and with willfully subscribing to false statements regarding his adjusted gross income in tax returns filed by him in 1960, 1961, and 1962 (26 U.S.C. 7206). Counts one and three charged him with tax evasion for the years 1960 and 1961, and counts two, four, and five charged him with perjury for the years 1960, 1961, and 1962. The Government attempted to prove counts one and three by the "net worth and expenditures" method, and counts two, four, and five, by the "specific item" method. The court, sitting without a jury, convicted him of counts one, three, and four, and acquitted him of counts two and five (86a).

The Government identified the specific items alleged to have been omitted from the defendant's 1960 tax return, as follows: $1,000.00 given to defendant by a Paul Shelton during his 1960 campaign for Sheriff of Davidson County; $500.00 given to defendant by an Ernest Jones during the 1960 campaign; two payments of approximately $400.00 each alleged to have been given the defendant by law violators as "protection money" (84a). The Government asserted that the Shelton and Jones payments were made in order to obtain personal favors from the defendant. The defendant admitted receipt of these payments, but stated that his lawyer had advised him during his 1960 campaign that payments received by him from political supporters were nontaxable gifts. He denied receipt of either of the two alleged payoffs from law violators. The court found that the government had failed to sustain its burden as to any of these items, and acquitted the defendant of count two (84a).

The government identified the specific item alleged to have been omitted from the defendant's 1961 tax return as a payment of $500.00 made to the defendant around Christmas of 1961 by the same Ernest Jones referred to in Count Two (84a-86a). The government made the same assertion with respect to this payment: that it was a payment made in order to secure a personal favor from the defendant. The alleged favor was the continuation of Jones' contract to supply oil and gas to the Davidson County sheriff's patrol. There was no evidence that the defendant and Jones had ever discussed this contract. There was evidence that the contract was continued on the basis of merit, and that the defendant played no direct role

in the decision to continue it (23a; 55a-60a). The defendant testified that he had regarded this payment in the same light as the 1960 Jones payment—as a non-taxable political gift (65a-66a). The court rejected this testimony, and convicted the defendant of count four (85a).

Under count five, the government attempted to prove that the defendant had failed to report on his 1962 tax return income derived from a partnership called the "Capitol City Chemical Company." The court found no evidence that the defendant received any income from this entity in 1962, and acquitted him of count five (85a).

Although counts one and three were based upon a "net worth" theory of computation, they became for all practical purposes specific item counts, because the defendant's net worth deficiency for 1960 and 1961 was substantially accounted for by evidence of specific unreported receipts. These receipts were in the form of political and personal donations received by the defendant from various persons during his campaign for Sheriff of Davidson County and during his first year in office as Sheriff.

The government asserted that a substantial portion of the funds received by the defendant during his 1960 campaign were taxable because the defendant had used them for personal, rather than campaign, expenses. These donations were made personally to the defendant during the course of his campaign. Many of the donors testified that they attached no conditions to them as to use. Some assumed the monies would be used in the campaign. The defendant admitted, both in interviews with the government and

during the trial, that after the 1960 campaign was over, he deposited the unspent remainder of these donations in a personal savings account (54a). He testified that he had not reported any portion of these donations in his 1960 tax return, because he had been advised by his lawyer that they were nontaxable gifts (64a). The government asserted that these donations were taxable to the extent they were "diverted" to defendant's personal use, that the defendant's deposit of the unspent remainder of the donations was such a diversion, and thus his failure to report the funds thus diverted was a willful attempt to evade payment of taxes. The court apparently accepted these assertions, and convicted the defendant of count one (83a-84a).

The government also asserted that some of these unreported receipts—in particular, the Jones and Shelton payments asserted as specific items under counts two and four of the indictment—were taxable as graft payments. The court acquitted the defendant as to the Shelton payment and the 1960 Jones payment, but convicted him as to the 1961 Jones payment.

The court's finding that the Jones payment was willfully omitted from the defendant's 1961 tax return applied to both count three, the tax evasion count, and to count four, the specific item—perjury count. The defendant was convicted of count three as well as count four.

In affirming the defendant's convictions the Court of Appeals held: (1) That the campaign donations received by Jett in 1960 were taxable to the extent they were "diverted" to his personal use; (2) That the 1961 Ernest Jones payment was taxable; and (3) That the Government introduced sufficient independ-

ent evidence of willfulness to sustain the convictions.* The Court found that the following items of evidence constituted substantial independent evidence of willfulness:

a. Allegedly inconsistent statements made by the defendant to Revenue Agent John Mask during investigatory interviews in 1962. (Mask testified that the defendant told him during his first interview that he

*The opinion of the Court of Appeals contains several factual inaccuracies, which we feel should be corrected for the sake of the record.

1. On pages 3 and 4 of the opinion, the following statement appears:

> [W]hen confronted with the Government's net worth calculations and the necessity of showing receipt of nontaxable income to account for the increases in net worth, he furnished the Government with a list of other alleged contributors.

The petitioner was never confronted with the Government's net worth calculations during the investigation of the case and this clearly appears from the record. (See, e.g., 79a.)

2. On page 7 of its opinion, the Court of Appeals refers to the case of *O'Dwyer v. Commissioner* as a Seventh Circuit case. In fact, it is a Fourth Circuit case.

3. On page 7 of its opinion, the Court states that, according to the Government's figures, there was an understatement of income for the year 1961 of about $6,547.39. In fact, Government Exhibit B, which is appended to the Court's opinion, reflects an understatement of $5,966.42. Apparently, the figure stated by the Court is a combination of the Government's reported taxable income figure for 1961 of $6,547.97 and the "cents" portion of the Government's corrected taxable income figure for 1961 which is $12,514.39. Also, the Court failed to deduct a $1,123.30 expenditure for boat repairs, which was included in the Government's figures, but which the Court found should "be eliminated from the calculations" for lack of proof. See page 5 of opinion.

4. On page 8 of its opinion, the Court made the following statement: "Even if the evidence were insufficient to support counts one and two. . . ." Since the defendant was acquitted of count two in the trial court and convicted of count three, we are certain that the Court of Appeals intended to say "Even if the evidence were insufficient to support counts one and three. . . ."

had received only one gift during the tax years in question (28a). At a later interview, the defendant furnished Mask with a list of other gifts, including the Five Hundred Dollars ($500.00) from Ernest Jones in 1961. In his own testimony, the defendant stated that he reported receipts to Mask as he remembered them from time to time during the various interviews, and that Mask was aware that the receipts were being reported in a piecemeal fashion (69a, 70a). There was no apparent reason why the defendant should reveal a gift in the amount of One Thousand Dollars ($1,000.00) during his first interview, and intentionally conceal other similar gifts in smaller amounts; nor was there any change in circumstances between the first interview and the second interview which would justify an inference that the defendant felt compelled to reveal receipts during the second interview which he had deliberately concealed during the first interview.)

b. The fact that there was an understatement of income for both tax years, even after the gifts and campaign contributions were deducted from the net worth computations; and

c. The fact that no political campaign was conducted in 1961.

The Court of Appeals discounted the defendant's asserted reliance upon advice of counsel, because the Court felt that the evidence justified a finding that the defendant did not tell his counsel "that he was using any of the funds for personal use." (Opinion, p. 6.) The Court held that "Jett would have no right to rely on the advice of an attorney unless he made full disclosure of the *pertinent* facts." (Opinion, p.b.) By this, the Court apparently meant that the defend-

ant was required to reveal all legally relevant facts, regardless of whether he actually knew or believed that such facts were relevant. Certainly, there was no evidence in the record that either the defendant or his counsel actually believed that the use to which the funds were put was relevant to their taxability.

REASONS FOR GRANTING WRIT

1. *Taxability of Campaign Donations.*

This Court has never ruled upon the taxability of donations made to candidates for political office. We submit that the Court should do so now, for the following reasons.

a. The taxability of campaign donations is of vital concern to the thousands of taxpayers who have been or will be candidates for political office in this country. Many of the affected taxpayers are now holding political office at municipal, state and national levels. Under the rule of taxability applied in this case, many of these officials may now or hereafter be subject to prosecution for income tax evasion.[1] It is of extreme importance to the general public, as well as to the affected taxpayers, that the taxability of political donations be clarified, and that a nationally uniform principle of taxability be adopted.

b. The rule of taxability applied in this case, and in the case of *O'Dwyer v. Commissioner of Internal Revenue*, 266 F2d 575 (4th Cir. 1959), is basically unsound. This rule is as follows:

> Where a political gift is received by an individual or a political organization and it is held or used

[1]The recent prosecution of former Governor William G. Stratton, in the Northern District Court of Illinois, is a dramatic case in point.

> for the purposes intended, i.e., for present or future expenses of a political campaign or for some similar purpose, it is not taxable income to the recipient. See I. T. 3276, *supra*. However, any amount diverted from the channel of campaign activities and used by a candidate or other individual for personal use constitutes taxable income to such candidate or other individual for the year in which the funds are so diverted.
>
> *O'Dwyer v. Commissioner of Internal Revenue*, 266 F2d 575, 585, n. 4, quoting *Rev. Rul. 54-80*, 1954—1. Cum. Bull. 11.

The only explanation given for this rule is that:

> Contributions to political organizations are *customarily* made with the intent and understanding that they be used for the expenses of a political campaign or for some similar purpose. (Emphasis added.)
>
> *Ibid.*

The implication is that political contributions are "customarily" gifts in trust, to be used solely for campaign purposes, and that a use of such donations for personal expenses is a breach of trust, which renders the funds so used taxable, on the same basis as embezzled funds. *C.f. James v. United States*, 366 U.S. 213 (1961). This is a very broad assumption. In some cases, an implied trust relationship may exist between donor and candidate. In many cases—particularly when the donation is made directly to a candidate by a personal acquaintance—a trust relationship obviously does not exist. Even if it could be said that a trust relationship "customarily" exists, the broad rule of Revenue Ruling 54-80 would still be unjustified. If political donations used for personal expenses are to be

taxed on a theory of breach of trust, the Government should be required to prove the existence of a trust relationship with respect to each individual donation. Taxability should depend upon actual, specific intent; not upon "customary" intent.

This Court has previously rejected broad, presumptive rules of taxability, based upon "customary experience." In *Duberstein v. Commissioner of Internal Revenue*, 363 U.S. 278 (1960), the Government urged the Court to adopt several presumptive rules regarding the taxability of transfers alleged to be gifts. The Court emphatically rejected this request, stating:

> We think, to the extent they are correct, that these propositions are not principles of law but rather maxims of experience that the tribunals which have tried the facts of cases in this area have enunciated in explaining their factual determinations. Some of them simply represent truisms: it doubtless is, statistically speaking, the exceptional payment by an employer to an employee that amounts to a gift. Others are overstatements of possible evidentiary inferences relevant to a factual determination on the totality of circumstances in the case: it is doubtless relevant to the overall inference that the transferor treats a payment as a business deduction, or that the transferor is a corporate entity. But these inferences cannot be stated in absolute terms.
>
> 363 U.S. at 287.

The rule of taxability applied in the instant case elevates a questionable "maxim of experience"—i.e., "Donations made to political candidates are customarily gifts in trust to be used only for campaign purposes"—to the status of a rule of law—i.e., "Donations made to political candidates are gifts in trust

and are taxable to the extent they are used for non-campaign purposes." The Government made little attempt to establish the intent of the parties at the time the various donations were made to the defendant, and no attempt to establish specific express or implied trust relationships. In holding that the donations were *per se* taxable to the extent they were used for personal expenditures, the District and Circuit Courts, in effect, presumed the existence of trust relationships without any evidence thereof. We submit that these holdings, and the presumptions on which they were necessarily based, are contrary to the principle of the *Duberstein* case, and should not be permitted to stand.

2. *The Finding that the Defendant Acted Willfully in Failing to Report "Diverted" Political Donations in His 1960 Return Is Contrary to the Decision in James v. United States.*

If the political donations received by the defendant in 1960 are taxable, they are taxable on the theory that (1) they were received in trust, and (2) the defendant committed a breach of trust when he "diverted" them to his own use. In *Commissioner v. Wilcox*, 327 U.S. 404 (1946), this Court held that funds obtained by breach of trust are not taxable. *Wilcox* was still the law when the present defendant filed his 1960 tax return, on April 6, 1961. On May 15, 1961, *Wilcox* was reversed by the decision in *James v. United States*, 366 U.S. 213 (1961). In the *James* case, the Court held that, although embezzled funds are taxable, the defendant could not be convicted of willful tax evasion, because *Wilcox* was still in effect at the time he filed his tax return:

> We believe that the element of willfulness *could* not be proven in a criminal prosecution for failing

> to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed (Emphasis added).
>
> 366 U.S. 213, 221, 222.

We submit, on the basis of the *James* holding, that the present defendant could not be convicted of willfulness for failing to include "diverted" campaign donations in his 1960 tax return. Either he had a right to apply these donations to his personal expenses, in which case they were unconditional, nontaxable gifts; or he did not have a right to do so, in which case he was guilty of a breach of trust. If he was guilty of a breach of trust, he was in precisely the same position as the defendant in the *James* case, and his conviction on count one of the indictment is in direct conflict with the *James* holding.

3. *Inferential Use of the Defendant's Uncorroborated Extra-Judicial Statement to Establish Willfulness.*

Willfulness is, of course, an essential element of the offense of tax evasion, and must be proven by substantial evidence, independent of the mere understatement of income. *James v. United States*, 366 U.S. 213 (1961); *Holland v. United States*, 348 U.S. 121 (1954). Since it is an essential element of the offense, it cannot be proven solely by uncorroborated exculpatory statements of the accused. *Opper v. United States*, 348 U.S. 84 (1959). The requirement of corroboration extends to the crime of tax evasion, even though "there is no tangible injury which can be isolated as a *corpus delicti*." *Smith v. United States*, 348 U.S. 147, 154 (1954); *Sansone v. United States*, 334 F2d 287 (8th Cir. 1964).

The only independent evidence of willfulness introduced in this case was the testimony of Revenue Agent John Mask, regarding inconsistent statements allegedly made by the defendant during investigatory interviews. The trial court virtually admitted that this was the only evidence of willfulness in the record. During final argument, one of the defense lawyers stated that no evidence of willfulness had been introduced. The Court stated:

> THE COURT: "Of course, you know what the Government relies on to show willfulness."
> MR. WILLIS: "The amount of the deficiency?"
> THE COURT: "No. Allegedly inconsistent statements that he made about these gifts from time to time on these different interviews."
> (76a).

The Court of Appeals could find no other evidence of willfulness, except the fact that there was an understatement of income for both years (which was not "independent" evidence of willfulness) and the fact that there was no political campaign in 1961 (which seems irrelevant, since the defendant did not claim his 1961 receipts were campaign contributions). Mask's testimony regarding the defendant's extra-judicial statements was wholly uncorroborated. We therefore submit that it was insufficient, under the holding in the *Opper* case, to establish the essential element of willfulness.

If the statements testified to by Mask had been in the form of direct admissions, the need for corroboration would be obvious. See *Sansone v. United States, supra.* (Involving a defendant's extra-judicial admission that he was aware of an unreported tax liability at the time he filed his tax return; the Eighth Circuit Court required and found corroborating

evidence of a "truly substantial nature.") The present defendant's extra-judicial statements were not used directly, however, but inferentially, as circumstantial evidence of a guilty mind: from the defendant's alleged initial reluctance to reveal the 1961 gift from Ernest Jones, the Government sought to infer that the defendant was aware that this gift was taxable, and that he had intentionally omitted it from his 1961 tax return. The question presented, therefore, is whether the requirement of corroboration should apply to extra-judicial statements of the accused which are used as circumstantial evidence of facts in issue, as well as to admissions by the defendant, which are used as direct evidence of the facts admitted. We submit that it clearly should.

Extra-judicial confessions are considered inherently untrustworthy, and have traditionally required corroboration. *Wigmore, Evidence*, §2071 (3rd Ed.). *Opper v. United States, supra.*, extended the corroboration requirement to exculpatory admissions, on the ground that:

> Given when the accused is under suspicion, they become questionable just as testimony by witnesses to other extra-judicial statements of the accused.
>
> 348 U.S. at 92.

Exculpatory admissions are felt to be "questionable" because an individual under investigation is likely to trap himself into making untrustworthy statements, through his desire to cooperate or his fear of prosecution:

> In many cases of this type, the prosecution relies on the taxpayer's statements, made to revenue agents in the course of their investigation, to

> establish vital links in the Government's proof. But when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick and choose from the taxpayer's statement, relying on the favorable portion and throwing aside that which does not bolster its position. The problem of corroboration, dealt with in the companion cases of *Smith v. United States, infra,* and *United States v. Calderon,* p. 202, therefore becomes crucial.
>
> *Holland v. United States,*
> 348 U.S. 128, 129 (1954).

See, also, *Smith v. United States,* 348 U. S. 147, 153 (1954); and *United States v. Calderon,* 348 U.S. 160, 164 (1954).

The danger that an accused may be unfairly trapped during an investigatory interview is greatly increased if his statements are later used against him circumstantially, rather than directly. At the time he makes such statements, he may be totally unaware of the inferences that will be drawn from them when they are reproduced at trial. The inferences may be mistaken and capable of being explained; but, being unaware of them, the accused may lose his chance to explain them to the agent. This is especially true of allegedly inconsistent statements, which are as likely to be the result of faulty memory, confusion, or fear, as of a deliberate intent to conceal evidence of guilt.

We therefore submit that the requirement of corroboration should be expressly extended to include circumstantial, as well as direct, use of extra-judicial statements. If this were done, the convictions in the present case—which rest solely upon such evidence—would fall.

4. The Use of Post-Offense Statements of the Accused for the Purpose of Showing Knowledge of the Accused at the Time of the Offense.

There is a serious question as to whether Mask's testimony can be given any weight whatever, insofar as it was offered to show the defendant's knowledge of an unreported tax liability. The Government claimed that the defendant falsely told Mask in July, 1962, that he had received only one gift during the tax years in question, and that this was evidence that the defendant knew that the Jones gift, which he failed to reveal, was unreported taxable income. If the defendant knowingly made a false statement of this kind, he thereby committed a separate offense, for which he could have been separately indicted and tried. See *Beacon Brass Company v. United States*, 344 U.S. 43 (1952). Thus, the Government introduced evidence of an alleged subsequent offense (deliberate false statement to a revenue agent in July, 1962) for the purpose of proving the state of the defendant's knowledge at the time of alleged prior offenses (tax evasion in April of 1961 and 1962).

There is a conflict among the Circuits as to whether evidence of a subsequent offense may be introduced for the purpose of showing the defendant's knowledge at the time of the offense for which he was indicted. The Sixth Circuit Court has previously approved such practice. See *Emmich v. United States*, 298 Fed. 5, 9 (6th Cir. 1924); and *United States v. Northern*, 329 F2d 794, 795 (6th Cir. 1964). The Sixth Circuit's position is apparently supported by a *dictum* in the Third Circuit case of *United States v. Prince*, 264 F2d 850, 852, n. 1 (3rd Cir. 1959).

Where evidence of similar acts or conduct is al-

> lowed to show knowledge, willfulness and intent as in this instance, the fact that they occurred subsequent to the crime named in the indictment is no bar to admissibility of the evidence.

Other Circuit Courts have taken a contrary view, holding that evidence of subsequent offenses is inadmissible for the purpose of proving knowledge at the time of a prior offense. In *Witters v. United States*, 106 F2d 837 (D.C. Cir. 1939), the defendant had been convicted of selling stolen bicycles. The trial court had admitted evidence that the defendant had made similar sales subsequent to the sale for which he was indicted. This evidence had been admitted for the purpose of showing the defendant's knowledge that the bicycles he was indicted for selling were stolen. The Circuit Court reversed his conviction, holding that:

> [O]ne cannot have knowledge of a fact at a certain time through some happening or occurrence that may take place in the future. . . . [T]he admission of the evidence of subsequent offenses for the purpose of showing prior knowledge was fatally prejudicial and necessitates a reversal of the judgment.
>
> *Witters v. United States*, 106 F2d 837, 840 (D.C. Cir. 1939)

In accord with this holding are *III Wigmore, Evidence* §316; *Hubby v. United States*, 150 F2d 165 (5th Cir. 1945); *Roe v. United States*, 316 F2d 617, 621 (5th Cir. 1963); and *Rodriguez v. United States*, 232 F2d 819 (5th Cir. 1956). See, also, *Anthony v. United States*, 256 F2d 50 (9th Cir. 1958), in which the Court recognized the *Witters* principle, but did not apply it, because the subsequent offense occurred less than half

an hour after the offense for which the defendant was indicted.

The instant case graphically illustrates the importance of resolving the above conflict. Two factors commonly present in tax evasion cases conjoin in this case. First, this prosecution was based almost entirely upon information derived from the defendant during investigatory interviews. Secondly, the defendant's knowledge of an unreported tax liability was a central issue in this case, as it has been in many recent tax evasion cases. See, e.g., *James v. United States*, 366 U.S. 213 (1961); *Ingram v. United States*, 360 U.S. 672 (1959); *Sansone v. United States*, 334 F2d 287 (8th Cir. 1964); and *Edwards v. United States*, 334 F2d 360 (5th Cir. 1964). The conjunction of these two factors emphasizes the importance of determining whether statements made during investigatory interviews can be used as circumstantial evidence that the defendant had knowledge of an unreported tax liability at the time he filed his return. We submit that this question should be decided in the negative, and that the Sixth Circuit Court holdings in this regard should be brought into conformity with those of the Fifth, Ninth, and District of Columbia Circuits.

5. *Advice of Counsel; Failure to Disclose all Legally Relevant Facts*

The Court of Appeals discounted the defendant's asserted reliance upon advice of counsel, on the theory that the defendant "would have no right to rely on the advice of an attorney unless he made full disclosure of the pertinent facts." The "pertinent facts" referred to were the defendant's use of political donations for personal expenditures. Such use was un-

doubtedly legally pertinent according to rule of the *O'Dwyer* case. It is, however, quite evident that neither the defendant nor his counsel was aware of the *O'Dwyer* rule at the time the legal advice was given. (34a-38a; 78a; 80a). The *O'Dwyer* rule is an extraordinary principle of taxation. It is apparently the only existent rule of taxability that determines the taxability of receipts by the use to which they are put.[2] There is no basis in the record for a finding that Jett actually knew or believed that his personal use of these funds was relevant to their taxability, and we do not understand that either the trial or Appellate Court felt that such a finding was justified. The Court of Appeals apparently held that the defendant was required to reveal all legally pertinent facts to his lawyer, regardless of whether he knew or believed they were pertinent.

This is an extraordinary and we submit, obviously incorrect holding. "Willfulness" involves actual awareness of the existence of a tax liability. If a defendant shows a lack of such awareness, by virtue of reliance upon advice of counsel, it should make no difference whether the lawyer who gives the opinion was aware of all of the legally pertinent facts. It should matter only that the defendant revealed all facts: (1) That he believed to be pertinent; and (2) that the lawyer inquired about. The defendant should be required only to show actual reliance upon advice of counsel,

[2]The difficulties created by this rule are reflected in the statements made by Senator Everett Dirksen during the Trial of William G. Stratton. This testimony is reproduced in its entirety in the Supplemental Appendix filed by the defendant in the Court of Appeals. The Court of Appeals refused to consider Senator Dirksen's statements, but we believe that they are proper subjects of judicial notice, and request that this Court consider them. C.f. *Brown v. Board of Education*, 347 U.S. 483, 493-96 (ns. 10 and 11) (1954).

not professionally intelligent reliance, or even reasonable reliance. *cf. James v. United States*, 366 U.S. 213, 246 (1961) (Separate opinion):

> "[D]istinctions in terms of the nature of the defendant's legal misapprehension its degree, its justifiability, or its source are [not] warranted. . . ."

Advice of counsel is one of the few clear-cut defenses available to defendants in tax evasion cases. It is often the only, or best, means of distinguishing an honest tax payer from a criminal. The holding in this case, that a defendant has "no right to rely on the advice of an attorney unless he [makes] full disclosure of the [legalty] pertinent facts," seriously impairs this vital defense, and in effect, erases the distinction between civil and criminal tax liability.

The present holding raises the same standard-of-guilt issue raised in *James v. United States*, *supra*, and it is objectional for the same reasons the *James* conviction was objectionable. We submit that there is no issue connected with tax evasion prosecutions that is more deserving of this Court's attention than the defense of advice of counsel. If the Circuit Court's holding on this issue is permitted to stand in its present unclarified form, much confusion will be generated regarding the standard of guilt in tax evasion cases, and the right of defendants to have their moral capability determined beyond reasonable doubt will, in many cases, be seriously impaired.

CONCLUSION

Petitioner prays that he be granted a review of his conviction on writ or certiorari; that the said con-

viction be reversed; and that the petitioner be discharged, or in the alternative, granted a new trial.

Respectfully submitted,

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No. 16105

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LESLIE E. JETT, *Defendant-Appellant.*	APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided October 26, 1965.

Before WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

WEICK, Chief Judge. Appellant Jett has appealed from a judgment of conviction on three counts of a five count indictment charging him with violation of the income tax laws. Trial by jury was waived and the case was tried by the District Judge. Findings of fact were also waived.

Counts 1 and 3 of the indictment charged Jett with income tax evasion for the calendar years 1960 and 1961, respectively, in violation of 26 U.S.C. § 7201. The method of proof with respect to these two counts was by net worth. Counts 2, 4 and 5 charged Jett with filing false returns for the calendar years 1960, 1961 and 1962, in violation of 26 U.S.C. § 7206(1). The method of proof of these three counts was by specific items omitted from his income tax returns.

The District Court found the defendant guilty on counts 1, 3 and 4 and not guilty on counts 2 and 5. Count 2 involved specific items of alleged graft. The

Court had a lingering doubt of guilt concerning count 2 because of conflicting evidence and the reputation of some of the parties. Count 5 involved specific items of income allegedly received from a partnership. With respect to this count the Court found that although Jett was a silent partner, the evidence did not disclose the amount of income received. He sentenced the defendant to eighteen months' imprisonment on counts 1, 3 and 4, to run concurrently.

The principal point raised on appeal was that the District Court erred in denying defendant's motion for judgment of acquittal. In considering this issue we must view the evidence together with inferences properly deducible therefrom, in the light most favorable to the Government and determine whether the judgment of conviction is supported by substantial evidence. *Ross* v. *United States*, 197 F.2d 660 (6th Cir. 1952); *Battjes* v. *United States*, 172 F.2d 1 (6th Cir. 1949).

Jett won nomination for the office of sheriff of Davidson County, Tennessee, at the primary election held on March 31, 1960. He was elected sheriff at the general election and took office on September 1, 1960. The increases in his net worth occurred during the political campaign and the tenure of his office.

In 1960 Jett reported taxable income of $1,212.43. The Government's computation of taxable income revealed that he received taxable income for that year of $9,175.75, resulting in an understatement of $7,963.32. For 1961 his reported taxable income was $6,547.97. His actual income as computed by the Government was $12,514.39 and the understatement was $5,966.42. The Government's net worth determi-

nations and computations of taxable income appear in Appendices A and B.

There was no dispute as to the assets and liabilities shown in the Government's net worth determination of taxable income except as to an item of $200 for a horse, which was inconsequential. Jett disputed the following items shown in the computation of taxable income under "Personal Expenditures":

Support of mother-in-law	(1961)	$ 750.00
Payments to W. E. Belcher	(1960)	700.00
Repairs on boat (Hargrave)	(1961)	1,123.30

These disputed items will be considered later.

Jett further disputed the likely sources of income asserted by the Government involving alleged gifts made to him during the political campaign and after he became sheriff, which gifts he either used to pay for living expenses or deposited in his wife's savings account from time to time. These were not included in his income tax returns. The Government also claimed that he received graft or pay-offs.

Jett was interviewed by Special Agents of the Internal Revenue Service on at least three occasions in 1962. He was questioned concerning his assets, liabilities, and income. Special Agent Mask, who was in charge of the investigation, testified as to conditions in Davidson County and Nashville which existed prior to Jett's election and continued under his administration. Wide open gambling was being conducted in the area and sales of intoxicating beverages by the glass were made, all in violation of Tennessee laws. Mask further testified on cross-examination by Jett's counsel as to hearsay evidence of pay-offs to Jett.

Mask testified that in his initial interview with Jett on July 14, 1962, Jett told him that Paul Shelton

had made a cash gift to him in 1960 for living expenses in the amount of $1,000. Shelton had been employed as a patrolman by Jett's predecessor in office. When Jett took office he not only retained Shelton but promoted him over the offices of corporal and sergeant to lieutenant. Jett did not include the $1,000-item in his 1960 income tax return.

Jett further told Mask that except for the Shelton payment he received no additional gifts in 1960 and 1961. Later, when confronted with the Government's net worth calculations and the necessity of showing receipt of nontaxable income to account for the increases in net worth, he furnished the Government with a list of other alleged contributors. Appendix C, prepared by the Government, contains the list of personal gifts claimed by Jett and the extent to which the Government claims he made proof of them at the trial. It lists campaign contributions paid direct to Jett, campaign contributions paid to Jett's campaign treasurer, and other payments to Jett. The government interviewed each available person shown on the list and subpoenaed such person to testify at the trial.

Appendix C lists Ernest Jones as making two gifts of five hundred dollars each to Jett, both of which were made in cash. The first alleged gift was made during the campaign in 1960 and the second was made at Christmas in 1961. Jones was the supplier of gasoline and oil for the automobiles in the sheriff's patrol. He testified that the reason he made the gifts was so that he might retain the oil and gasoline business.

The item of seven hundred fifty dollars shown for the support of the mother-in-law in 1961 did not involve cash. Rather, it consisted of the value of vegetables on the verge of spoiling, which a supplier of the

county permitted Jett to take without charge therefore, each week, and which were delivered to the mother-in-law by Mrs. Jett.

Relative to the item of seven hundred dollars, representing payments to W. E. Belcher, there was evidence tending to prove that prior to Jett's election as Sheriff he was Civilian Defense Director; that he sold a generator belonging to the Government to Belcher for two hundred dollars; and that after becoming sheriff, Jett endeavored to secure the return of the generator so that he could place it back in inventory, but that Belcher wanted sven hundred dollars for it. Jett gave Belcher two hundred dollars and the generator was returned to him. Later Belcher demanded the balance of five hundred dollars, which was sent to him by Jett.

Jett's version of the transaction was that he merely loaned the generator to Belcher, who gave him the two hundred dollars as a guaranty that he would return it on demand; that he left the two hundred dollars in his desk in the Civilian Defense office; and that he paid the additional five hundred dollars to Belcher to compensate him for services which he rendered Jett during the campaign.

On cross-examination Belcher testified:

> "Q And Sheriff Jett gave you five hundred dollars for working for him in that campaign, did he not?
>
> "A Well, he said we would call it that. He said he felt like he owed me something."

With reference to the boat, there was evidence that Jett was using the boat frequently and wanted to purchase it in the name of another person. There was no evidence that he paid for the repairs on the

boat in the amount of $1,123.30. The item should therefore be eliminated from the calculations with respect to personal expenditures.

In our opinion there was substantial evidence to support the conviction on counts 1 and 3 of the indictment. Even if Jett were allowed credit for all disputed items, there still remained a substantial understatement of income for the years 1960 and 1961.

Jett claimed that in not reporting the gifts which he used for living expenses or deposited in his wife's savings account, he relied on the advice of his attorney, Charles C. Morrow. Mr. Morrow was a classmate of Jett in law school. He saw Jett in the hotel where the campaign headquarters were located, and while in the hall was asked by Jett whether campaign donations were taxable. Morrow stated that he would look into the matter and later advised Jett that gifts to assist in his political campaign were not taxable income.

Upon being questioned by the Court, Morrow stated that there was no discussion with Jett about using campaign money for personal expenses. He did not recall that Jett told him that he was using any of the funds for personal use.

Jett testified that he told the lawyer he was using the money for his own personal use and was living off it. Since the testimony of Morrow conflicted with that of Jett, the District Court could, as he obviously did, resolve the conflict by crediting Morrow over Jett.

We are certain that Morrow, upon investigating the law, could have found no legal support for Jett's claim that funds contributed to a political campaign and diverted for personal use, were nontaxable.

Furthermore, Jett would have no right to rely on

the advice of an attorney unless he made full disclosure of the pertinent facts. *United States* v. *Baldwin*, 307 F.2d 577 (7th Cir. 1962). Jett did not make such disclosure.

Jett further contended that the Government failed to prove willfulness. He urged that he believed that the gifts and campaign contributions were not taxable. He stated that the law on this subject was not established until the case of *O'Dwyer* v. *Commissioner*, 266 F.2d 575 (4th Cir. 1959) was decided, which was only one year before his campaign.

The law was established long before *O'Dwyer*. *Paschen* v. *United States*, 70 F.2d 491, 500 (7th Cir. 1934); *Reichert* v. *Commissioner*, 19 T.C. 1027 (1953) aff'd on other grounds 214 F.2d 19, cert. denied 348 U.S. 909.

In 1939 there was in effect Revenue Ruling I.T. 3276, reported in 1939-1 Cum. Bull. 108, which held that:

> "[A] political gift received by an individual or by a political organization is not taxable to the recipient."

In 1954 another Revenue Ruling was adopted holding that campaign funds which are diverted and used for personal use, constitute taxable income. Rev. Rul. 54-80, 1954-1 Cum. Bull. 1. This later ruling modified I.T. 3276 to the extent that it was inconsistent. We agree with the Seventh Circuit in *O'Dwyer* that these two revenue rulings are not necessarily inconsistent and that the later ruling was declaratory of judicial interpretation of existing law. I.T. 3276 does not hold that the personal use of campaign contributions resulted in no tax liability. Jett could not have relied on I.T. 3276 in 1961 when he filed his 1960 income

tax return because Rev. Rul. 54-80, 1954-1 Cum. Bull. 11 supplanted it in 1954. The later ruling was thus in force for about seven years prior to the filing of Jett's 1960 return.

Since the statutes penalize the willful attempt to evade income taxes, proof of a willful purpose to evade the tax is necessary and an actual bona fide misconception of the law will not result in criminal liability. *Battjes* v. *Unted States*, 172 F.2d (6th Cir. 1949).

Bearing on the subject of willfulness, the District Court had the right to consider the inconsistent statements given by Jett to the Special Agents, the consistent understating of income in substantial amounts for both of the tax years, the fact that understatements exist even if the alleged gifts and campaign contributions received by Jett were eliminated from the computations, the fact that no campaign was conducted in 1961, and the fact that there was an understatement for that year of about $6,547.39. Jett's auditor arrived at a figure of $3,191.12.

In our judgment there was substantial evidence of willfulness.

Count 4 was a specific item charge which covered the alleged gift at Christmas in 1961 of five hundred dollars to Jett by Jones, who was the supplier of gas and oil. There was no campaign in progress at that time. Jones testified that he made the gift in order to retain the gas and oil business. The following year when Jones lost the business because the new Metropolitan Government assumed the functions of the sheriff's patrol, Jones made a gift at Christmas to Jett of wine glasses, costing about fifteen dollars. The District Court did not err in treating this item of five

hundred dollars as taxable income.

The sentences on all three counts were to be served concurrently and were for less than could have been imposed on one count. Even if the evidence were insufficient to support counts 1 and 2 (which it was not) we would still be required to affirm the judgment because no error exists with respect to count 4.

Hirabayashi v. *United States*, 320 U.S. 81, 85 (1943).

We find no prejudicial error in the record.

Affirmed.

Government's Exhibit 83

Appendix A

GOVERNMENT'S EXHIBIT 83.

Leslie E. and Marie Jett
Net Worth Determination of Taxable Income

	December 31		
Assets	1959	1960	1961
Cash on Hand	$ -0-	$ -0-	$ -0-
Savings Account—Mrs. Jett	401.43	2,167.11	6,067.45
Loan Receivable—Warren Jett	—	2,000.00	—
Residence—2400 Eastland Ave.	13,300.00	13,300.00	13,300.00
Household furnishings	5,915.23	8,713.52	8,713.65
Autos	2,339.00	4,662.76	4,662.76
Horse	—	200.00	200.00
Total Assets	$21,955.66	$31,043.39	$32,943.86
Liabilities			
Notes Payable—Furniture	$ 297.83	$ 1,998.29	$ 361.84
Loans Payable	-0-	3,400.00	-0-
Mortgage Payable	12,166.89	11,900.14	11,621.15
Total Liabilities	$12,464.72	$17,298.43	$11,982.99
Net Worth	9,490.94	13,744.96	20,960.87
Prior Year's Net Worth		9,490.94	13,744.96
Increase in Net Worth		$ 4,254.02	$ 7,215.91

Government's Exhibit 84

Appendix B

GOVERNMENT'S EXHIBIT 84.

Leslie E. and Marie Jett
Computation of Taxable Income

	1960	1961
Increase in net worth	$ 4,254.02	$ 7,215.91
Add Personal Expenditures:		
Election qualifying fee	2,161.30	—
Payroll deductions	894.59	2,311.20
Pasture rent	45.00	110.00
Payments to Mrs. Bissinger	550.00	900.00
Payments to Dave Pomeroy	—	200.00
Payments to clothing stores	1,126.75	1,322.65
Support of mother-in-law	—	750.00
Auto tag and licenses	—	17.50
Payments to W. E. Belcher	700.00	—
Home insurance, taxes & interest	760.76	769.51
Interest paid to 1st American Nat'l Bk.	189.96	23.40
Other living expenses	3,472.93	4,021.21
Repairs on boat (Hargrove)	—	1,123.30
Less:		
Income tax refund	(220.52)	(324.92)
Sale of old clothes and stove	—	(300.00)
Gain on trade of auto	(33.96)	—
Itemized deductions	(1,725.07)	—
Personal exemptions	(3,000.00)	(3,600.00)
Corrected Taxable Income	$ 9,175.75	$12,514.39
Less: Reported taxable income	1,212.43	6,547.97
Understatement of Taxable Income	$ 7,963.32	$ 5,966.42

Government's Exhibit 82

Appendix C

GOVERNMENT'S EXHIBIT 82.

Payments to Defendant—1960

	Personal Gifts to Jett Per Jett	Proved	Campaign Contributions Pd. to Jett	Pd. to Others	Other Payments to Jett
Dr. R. C. Patterson	$ 15.00	-0-	$ 15.00	$	$
Fred Robinson	500.00	-0-	500.00		
Allen-Bean	25.00	-0-	25.00		
Cecil Collins	100.00	-0-	100.00		
Silliman Evans, Jr.	250.00				
Ernest Jones	500.00	-0-			500.00
Ralph Hicks	50.00	-0-	?		
Gene Hester	100.00	-0-		100.00	
J. P. Brown	50.00	-0-	50.00		
Eagle Cleaners	100.00	-0-		100.00	
Boots Vaughan	100.00	-0-	100.00		
Paul Shelton	1,000.00	-0-			1,000.00
Crescent Am. Co.	250.00	-0-	200.00		
Mrs. Maud Robinson	250.00	-0-	-0-		
Phillips-Robinson Co.	250.00	-0-	200.00		
A. H. Johnson	500.00	-0-	500.00		
Herbert Jones	500.00	-0-		1,000.00	
Ernest Jones	500.00	-0-			500.00
Donelson Fire Dept.	100.00	-0-	-0-		
Joywood Fire Dept.	100.00	-0-	25.00		
Bracey-Welch Co.	100.00	-0-	-0-	-0-	-0-
Bill Johnson	50.00				
Gene Hill	50.00	-0-	-0-	-0-	-0-
Al King	100.00	-0-	100.00		
John I. Harris	100.00	-0-			
Ray McClard	50.00	-0-		100.00	
Dr. W. F. Fessey	200.00				
Arthur Burnett	100.00	-0-	-0-		
Johnny Beazley	100.00	-0-	?		
J. L. Perry, Jr.	150.00	-0-	____	100.00	____
Total	$6,240.00	-0-			